

Mosey Manufacturing Company, Inc. and Eastern Indiana District Council of Carpenters, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Case 25-CA-9355

April 3, 1981

SUPPLEMENTAL DECISION AND ORDER

On July 20, 1977, Eastern Indiana District Council of Carpenters, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, was certified as the exclusive representative of a certain appropriate unit of employees of Respondent, following an election and subsequent resolution of Respondent's objections to conduct affecting the results of the election.¹ Thereafter, on February 13, 1978, the National Labor Relations Board issued a Decision and Order,² finding that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain with the certified Union and ordered Respondent to bargain in good faith with the Union. Respondent refused to comply with this Order, contending that the Board's certification of the Union was invalid.

Thereafter, the Board filed with the United States Court of Appeals for the Seventh Circuit a petition for enforcement of its Decision and Order. On March 27, 1979, a panel of the Seventh Circuit Court of Appeals issued its decision³ denying the Board's petition and remanding the case to the Board. The court decided that since *General Knit of California, Inc.*, 239 NLRB 619 (1978), issued after briefs had been filed with the court, the Board should be enabled to remand the case to the Regional Director for further investigation or hearing in light of the *Hollywood Ceramics*⁴ standards now in effect, and free from any influence stemming from a prior reliance on *Shopping Kart*.⁵

The Board accepted the remand and on June 19, 1978, issued an order remanding the case to the Regional Director for Region 25 for such further proceedings as are appropriate in conformity with the court's remand.⁶ Subsequently, a hearing was

held on December 6, 1979, in Richmond, Indiana, before Administrative Law Judge James Y. Youngblood who issued the attached Supplemental Decision on August 29, 1980. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,⁷ and conclusions of the Administrative Law Judge, as modified herein.⁸

The General Counsel excepts to the Administrative Law Judge's finding that Respondent's Objection 2(b) constitutes objectionable conduct and warrants setting aside the election, and to his failure to conclude, therefore, that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. We find merit in this exception.

Respondent's Objection 2(b) alleges that the Union misrepresented to bargaining unit employees that they would receive at least a 10-percent wage increase, like the employees at American Motors Corporation (AMC), if the Union won the election.

The alleged misrepresentation occurred in a June 3, 1977, letter which was sent to employees in response to campaign material circulated by Respondent. The tone of Respondent's material is significant and bears repeating here. Respondent's material was captioned "CARPENTERS ORGANIZERS PUT UP OR SHUT UP CHECKLIST." On the "checklist" Respondent suggested that its employees get guarantees from the Union in writing on crucial issues in the campaign. The first guarantee it suggested that should be set down in writing was:

1. I guarantee that if the Carpenter's Union wins the election, you will receive a bigger

tains its status as an unfair labor practice proceeding, we find no merit in Respondent's contention. See *Robert's Tours, Inc.*, 244 NLRB 818 (1979).

⁷ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We note that in connection with Respondent's Objection 2(d), the Administrative Law Judge incorrectly stated on p. 7, l. 1 of the third paragraph of his Decision, that the alleged misrepresentations of law regarding Respondent's right to close its plant were made before the filing of the petition, when actually they were made 5 days after the petition was filed. However, since the Administrative Law Judge overruled this objection primarily because he found that the statements made by the union representatives are consistent with the Board law in that area, and we agree with this finding, we do not rely on the Administrative Law Judge's erroneous statement and the conclusions he draws from it.

⁸ We note and hereby correct the Administrative Law Judge's inadvertent reference to "Respondent" rather than the "Union" in ll. 1 and 5 of his recommended Order.

¹ Case 25-RC-6619.

² 234 NLRB 908 (1978).

³ 595 F.2d 375 (1979).

⁴ *Hollywood Ceramics Company*, 140 NLRB 221 (1962).

⁵ *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

⁶ Respondent excepts to the Administrative Law Judge's failure to permit evidence on all of Respondent's original objections to the June 10, 1977, election. Since we agree with the Administrative Law Judge that the Seventh Circuit remanded the case to the Board for reconsideration of only those objections of Respondent alleging union misrepresentation during the election campaign, we find no merit in Respondent's exception. In its brief, Respondent also contends that the Regional Director for Region 25 incorrectly ordered this case returned to the Administrative Law Judge, instead of ordering a *status quo ante* investigation or an evidentiary hearing before a hearing officer. Since this case on remand re-

wage increase than you would receive without the Union.

Signed _____ Date _____
Carpenter's Union Representative

It was in response to the above that the alleged misrepresentation occurred. The Union's reply stated in part:

1. Just because the sun comes up today, I can't guarantee it will come up tomorrow. Mr. Mosey knows this. What I can guarantee is that your Local will get as much, if not more, *support* as American Motors of Richmond did (they ended up with a first year pay increase of *around* 10%) and that I'll guarantee. [Emphasis supplied.]

The Administrative Law Judge found that this statement constitutes a substantial departure from the truth under the standards set forth in *Hollywood Ceramics* since the collective-bargaining agreement between the Union and AMC only provided for an immediate base pay increase of around 5 percent, not 10 percent. The Administrative Law Judge further found that Respondent was precluded from making an effective reply to the misrepresentation because it became aware of the letter only 4 days before the election. We disagree.

First, we believe it important to note the context in which the alleged misrepresentation occurred here. It was in reply to Respondent's material which suggests the employees should get a written guarantee as to the amount of the wage increase that the Union would negotiate. Respondent's inquiry obviously required a reply. It is also significant, in our opinion, that the Union did not guarantee a 10-percent increase. It guarantees *only as much support* as the AMC employees received. In parenthesis the response indicates that the AMC employees got an increase of *around* 10 percent.

Secondly, we do not believe that on the facts of this case a possible misrepresentation of a 10-percent pay increase rather than 5 percent, where the Union merely guarantees that the employees will get as much support from the Union as did employees at another plant, constitutes, under any standard, such a substantial departure from the truth as to have a significant impact on the election. But, in any event, here there was no such misrepresentation for, while the immediate base pay increase set forth in the collective-bargaining agreement between AMC and the Union is approximately 5 percent, the agreement also provides for a cost-of-living increase up to 25 cents an hour to take effect the first year of the contract. Since the Union's letter states only generally that the AMC employees' "first year pay increase" will be

around 10 percent, we believe it reasonable to interpret that statement as referring to both the base pay increase plus the cost-of-living increase. If the base pay increase is combined with the anticipated cost-of-living increase, the AMC employees would have obtained a total first year pay increase of about 10 percent, the figure used by the Union. Thus, we find that the Union's representation is not a substantial departure from the truth under *Hollywood Ceramics*, and, accordingly, we overrule Respondent's Objection 2(b).

Since we have adopted the Administrative Law Judge's findings that all of Respondent's other objections to the election do not interfere with the employees' free choice, we reaffirm our previous certification of the Union as the exclusive bargaining representative of Respondent's employees in the unit found appropriate, and our previous decision that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union.

ORDER

It is hereby ordered that the Order issued by the Board in *Mosey Manufacturing Co., Inc.*, 234 NLRB 908 (1978), be, and it hereby is, reaffirmed.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: On April 15, 1977,¹ the Eastern District Council of Carpenters, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the Union), filed a representation petition seeking to represent the production and maintenance employees of Mosey Manufacturing Co., Inc. (herein called the Employer or Respondent), at the Employer's plants and warehouse located in Richmond, Indiana. On May 13, the Regional Director for Region 25 issued his Decision and Direction of Election in which he found that the unit sought by the Union was an appropriate unit for the purpose of collective bargaining.

On June 10, an election was conducted in the appropriate unit under the direction of the Regional Director of Region 25. The tally of ballots served upon the parties at the conclusion of the election shows that there were 72 eligible voters. Two of the eligible voters did not vote. The Union won the election by 1 vote, the votes cast for the Union were 35 and the votes cast against the Union were 34. One ballot was blank and there were no challenged ballots. On June 17, Respondent filed timely objections to the conduct of the election and conduct affecting results of the election. Along with its objections the Respondent furnished documentary evidence in support of its position in the form of affidavits and exhibits. On July 20, after investigation of the Respondent's objec-

¹ Unless otherwise specified all dates refer to 1977.

tions, the Regional Director for Region 25 issued and duly served on the parties his Supplemental Decision, Order, and Certification of Representatives in which he overruled Respondent's objections in their entirety and certified the Union as exclusive representative of all the employees within the unit found appropriate for the purpose of collective bargaining. On September 22, the National Labor Relations Board denied the Respondent's request for review.

On October 5, the Respondent, by letter, notified the secretary-treasurer of the Union as follows:

We will continue to refuse to recognize your labor organization as the proper collective bargaining representative of our employees until such time as there is a final ruling on the various issues raised in our Request for Review by the Court as provided under the National Labor Relations Act.

On October 17, the Union filed the instant charge alleging the Respondent's refusal to bargain. On November 15, the Acting Regional Director for Region 25 issued a complaint and notice of hearing in Case 25-CA-9355. On November 23, the Respondent filed an answer admitting certain allegations of the complaint, and admitting that it had mailed and caused the letter quoted above to be delivered to the Union on or about October 5, but denied the commission of any unfair labor practices, and asserted that because of certain improprieties surrounding the election that the Union was not properly the certified bargaining representative. On December 4, the General Counsel filed with the Board a motion to strike portions of Respondent's answer and Motion for Summary Judgment. On December 23, the Respondent filed a motion opposing the General Counsel's motion to strike and Motion for Summary Judgment and requested summary judgment on its own. On February 13, 1978, the Board issued a Decision and Order² in which it granted the General Counsel's Motion for Summary Judgment and found that, by refusing to bargain with the Union certified by the Board in the representation proceeding, the Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, and ordered the Respondent to cease and desist from committing such practices and to take certain affirmative action to remedy such unfair labor practices.

The Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of its Decision and Order. The matter was argued on January 2, 1979, and the Seventh Circuit entered its opinion on March 27, 1979, denying the Board's petition for enforcement and remanded the case to the Board for further proceedings consistent with the court's opinion [595 F.2d 375].

In its opinion the Seventh Circuit Court of Appeals noted that the Employer had refused to bargain because it asserted that the Union was improperly certified because the representation election was improperly conducted, objecting to (1) union misrepresentations, (2) union threats, (3) an improper union promise of benefit, and (4) improper conduct of a Board agent. In this connection, the court pointed out that whether campaign

misrepresentations constitute grounds for setting aside a representation election is an area of labor law recently subjected to great flux. The court noted that for many years the standards were those articulated by the Board in *Hollywood Ceramics Company*, 140 NLRB 221 (1962). The court summarized the standards as follows:

Under this test, an election should be set aside if there is (1) a misrepresentation of a material fact involving a substantial departure from the truth, (2) made by a party with special knowledge of the truth, (3) communicated so shortly before the election that the other party has insufficient time to correct it, and (4) involving facts about which the employees are not in a position to know the truth. The misrepresentation need not be deliberate so long as it may reasonably be expected to have significant impact on the election. [595 F.2d at 376, citing from *Hollywood Ceramics*, *supra*.]

The court further noted that on April 8, 1977, in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), a Board majority overruled *Hollywood Ceramics* and its standards. Thus, the Board majority held that elections would no longer be set aside solely because of misleading campaign statements, unless deceptive practices improperly involving the Board and its processes, or the use of forged documents, were present. The court further indicated that, under the *Shopping Kart* standard, the Board would no longer concern itself with the truth or falsity of campaign statements, but would leave to the employee-electorate the sorting of truth or falsity from all statements made in an election campaign. At the time of the present election, and until well after the Board's February 13, 1978, Decision and Order, the applicable standards respecting misrepresentations were those of *Shopping Kart*.

The court also noted that the *Shopping Kart* standards were shortlived, because on December 6, 1978, the Board decided *General Knit of California, Inc.*, 239 NLRB 619 (1978), in which the Board abandoned *Shopping Kart* as inconsistent with its responsibility to insure fair elections, and returned to the standards of *Hollywood Ceramics*. Because the *General Knit* case was decided after briefs had been filed with the court, both parties abandoned the principal thrust of their briefs, which had been based on *Shopping Kart*. Both the Board and Respondent contended at oral argument that the *Hollywood Ceramics* standards should be applied by the court. The court declined the joint suggestion that it apply *Hollywood Ceramics* standards and held that a remand to the Board was necessary. The court noted that if it were to apply the standards in effect at the time of the election, which were *Shopping Kart*, a remand would be unnecessary. The court further noted that if the Board should apply the *Hollywood Ceramics* standards this would constitute a retroactive application of those standards to the election here involved and to the objections made to that election. The court noted that whether standards should be retroactively applied is in itself a matter of agency discretion in the first instance. And in citing *Blackman-Uhler Chemical Division, Synalloy Corporation v.*

² 234 NLRB 908 (1978).

N.L.R.B., 561 F.2d 1118 (4th Cir. 1977), the court noted that in that case the Board declined to apply *Shopping Kart* retroactively. The court further noted that it declined to apply the *Hollywood Ceramics* standards presently in effect, in view of the paucity of the record in relation to these standards. The court stated that the Board should be enabled to remand the case to the Regional Director for further investigation or hearing in the light of those standards and free of any influence stemming from a prior reliance on *Shopping Kart*.³

It is clear that the court was concerned only with the standards to be applied in considering the union misrepresentation issue. Accordingly, I have limited this hearing, directed by the Regional Director, to the misrepresentation issue under the standards set forth in *Hollywood Ceramics*. I do not agree with the Respondent's contention that the court remanded this case to the Board for a complete development of all of the objections alleged by the Respondent to the election.⁴

FINDINGS OF FACT AND CONCLUSIONS

On June 17, the Respondent filed timely objections to the election which alleges in relevant part that:

2. Agents of the Union made material misrepresentations to the employees as follows:
 - a. Told employees the Employer is a subcontractor working under binding contracts.
 - b. Guaranteed employees they would receive at least a 10 percent wage increase if the Union won the election.
 - c. Told employees that present benefits would not be reduced in any collective bargaining agreement reached with Employer.
 - d. Told employees that in the event of a strike the Employer could not move or sell machinery.
3. Agents of the Union interfered with the employees' free choice by other acts of coercion and by other misrepresentation.

As indicated a hearing in this matter was held in Richmond, Indiana, on December 6, 1979, limited solely to the Union's alleged misrepresentations to the employees of Respondent.

In support of Objection 2a the Respondent offered testimony of Charles J. Mosey, vice president in charge of operations, who stated that Respondent is engaged in the process of machining components for automobiles, diesel engines, and other heavy machining for its customers. In this connection, the Respondent performs its machining operations for customers on parts owned by the customers. Respondent's work is not performed on a contract basis but instead simply on a purchase order. He stated that at the time of the election Respondent was not a

party to any binding contracts or subcontracts for its production activities. He testified that the Respondent owns the machines that it operates and that its machinery and equipment at the time of the election was not under any restrictions such as contracts or lease and could be sold or moved out at any time. He further testified that the Company has no restrictions on the cancellation of any of its jobs with its customers.

Employee Daniel A. Stephan testified that, during the middle of April, he attended a union meeting which was attended by approximately 25 of the Respondent's employees. The meeting was conducted by Union Representative Ron Liggett. He stated that the topic of discussion was the type of leverage that the Union would have to use over the Company in the event of bargaining and in the event of a strike. During this discussion Stephan stated that Liggett informed the employees that the Company could not move or sell its machinery. Stephan further testified that Dave Turner, a rank-and-file employee of Respondent, informed the assembled employees that the Respondent had a contract with Cummins Engine Company for a certain number of parts over a certain period of time. Turner further indicated that this could be a bargaining tool in respect to bargaining for a contract or in the event of a strike. Stephan further testified that as far as he could tell this statement was volunteered by Turner, and was unsolicited although union representatives were present. The statement was not challenged nor was it ratified by any union agent. Stephan testified that while he was at the meeting neither Liggett nor Jacobs talked about contracts. The statement attributed to Dave Turner, a rank-and-file employee of Respondent, that the Union informed the employees at this meeting that the Respondent had binding contracts with other employers, and therefore could not close its doors was not accepted or ratified by any union agent. It is well established that statements by rank-and-file employees not ratified or authorized by the Union cannot serve as a basis for setting aside an election.

Employee David F. Ellis testified that he attended a union meeting during the middle part of April, which was held in the Step-In-Lounge on South Fifth Street in Richmond, Indiana. To his knowledge this was the first organizational meeting. He said the union representatives present were Ron Liggett, Paul Yearling, and Mike Jacobs. Yearling was identified as a district representative for the Union and Mike Jacobs was identified as an organizer for the Union. Ellis stated that at the end of the meeting he was asked to stay and to serve on a 7-man spearhead committee. He said this committee was composed of seven employees, not including Jacobs. He said they discussed the ways and means to organize the Respondent, and he was told that they should do anything that would be feasible, profitable, and that the end justified the means. He also stated that Jacobs informed the committee that they should tell the employees, in the event they were fearful that the Company might close its doors, that the Company could not close its doors because it had contracts and subcontracts with companies that would prohibit them from closing their doors. He said that Jacobs named the Allison Company, the Com-

³ The court stated that it expressed no opinion on the merits of any of the objections to the election, and indicated that disposition of the present petition for enforcement concerns only the standards to be applied in considering the union misrepresentation issue.

⁴ On June 19, 1979, the Board reopened the record in this case and remanded the case to the Regional Director for such further proceedings as are appropriate in conformity with the court's remand. Pursuant to the Board's remand the Regional Director directed that a hearing be held on the issues raised by the court's opinion.

pany of Kelsey-Hayes, and the Company of Dexter. Ellis said that he repeated this statement to other employees of the Respondent. Ellis further testified that at a later union meeting Liggett told the assembled employees that the Company could not close its doors because a Federal law prohibited the Company from running away from an election. Ellis also testified that during the meeting that evening Liggett informed the employees that the Respondent could not close its doors because of contracts it had with several companies, specifically with Allison, Kelsey-Hayes, and Dexter. Jacobs did not testify. However, Liggett specifically denies making any statement concerning Respondent's not being able to close its doors because of subcontracts held by the Respondent.

Ellis testified that as part of his duties on the spearhead committee he was to serve "as sort of a spy to pose as a pro-company employee to draw people to my machine to keep them away from people who were pro-company." He stated that Jacobs told him that if the Union lost the election they would need ammunition for a mistrial. He stated that Jacobs asked him to sign an affidavit to the effect that he had been offered better jobs and positions with higher pay so they would have ammunition for a mistrial, and that he signed such an affidavit. He testified that this affidavit was not true and that he falsified the affidavit. Under these circumstances, as Ellis admits that he is a liar, and that he falsified a prior affidavit without compunction, I have no alternative but to disregard his total testimony.

As Turner was not an agent of the Union I cannot attribute any remarks made by him to the Union. I accept the testimony of Liggett that he made no comments regarding contracts of the Respondent with other Employers and therefore the Company could not close its business in the event of tough bargaining or in the event of a strike. Therefore this alleged misrepresentation cannot be a basis for setting the election aside.

In any event the Respondent admits that it became aware of the Union's claim that it had binding contracts with other companies approximately a week before the election. In fact the Respondent responded to the Union's claim in an undated letter to the employees. (See G.C. Exh. 4.) In that letter the Respondent stated that if it ever came to a strike they had no raw material inventories as their customers furnished all of their materials and we have no contracts for the work we do so there would be no penalties. As the Respondent had an opportunity to respond to the alleged misrepresentation, and in fact did so, it is my view that the election should not be set aside for this reason.

Additionally the Respondent claims that the Union, on several occasions, made material misrepresentations of the law regarding the Respondent's right to close its plant in the wake of a union organizational campaign or an election. In support of this allegation Ed Brockman testified that on April 20, at a union organizational meeting Brockman asked Mike Jacobs what would happen if "Mr. Mosey closed down the plant due to the Union being voted in." Brockman testified that Jacobs replied that Mosey would not close down the shop. Brockman then rephrased the question and asked if Mr. Mosey does close down the shop, could he open up a business repair-

ing and selling machinery? He testified that Jacobs said "Mr. Mosey could not open up a factory no place in the United States. He couldn't even open up a hot dog stand in Albuquerque."

In addition at another union organizational meeting David Ellis testified that Ron Liggett told the assembled employees that the Respondent could not close its doors because of a Federal law and that the Respondent could not move or sell its machinery. Because I do not accept the testimony of Ellis I discredit this statement. Ron Liggett credibly testified that he informed the employees at the April 20 meeting that the Respondent could not "sell all of its equipment, close the shops here and move them some place else for the purpose of getting out of the Union." He further told the employees that "it was a violation of Federal law for an employer to do something like that . . . as long as it was for the purpose of getting out of collective bargaining, or getting out of a Board election." At a later meeting, held on June 8, Liggett again informed the employees that it would be a violation of the law if the Company sold its business, because the employees wanted a union, and started the business somewhere else. He said that would be a runaway shop; that it was a violation of the law and that the Union would file charges against the Company if they did that. Ron Liggett's testimony was straightforward and had the ring of truth. Both statements by Liggett seemed to be consistent with Board decisions concerning employers who attempt to avoid Board representation procedures and unions by closing an existing plant and moving to another. It would appear that Liggett's statements would not be a misrepresentation of the existing law.

Additionally, the statements that Brockman attributes to Jacobs also are in my view consistent with current Board law that an employer cannot close an existing plant and move to another location to avoid Board representation procedures or unionization. Accepting Brockman's testimony I do not find any misrepresentation. In any event, this statement was made on April 20, before the filing of the petition and several months before the election and therefore not within the critical period. As such these statements made prior to the critical period may not be used as grounds for setting aside the election. See *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962).

Paragraph 2b of the Respondent's objections alleges that Respondent guaranteed employees they would receive at least a 10-percent wage increase if the Union won the election.

In support of this objection the Respondent offered the testimony of Frances Mussoni who testified that he is a foreman for the Respondent. However at the time of the events in this proceeding he was a machine operator for Respondent. He stated that he attended a union meeting on June 2, and that there were approximately 25 employees of the Respondent in attendance. He said the union representatives present were Ron Liggett, Mike Jacobs, and Kathy Ogren, the recording secretary for the local union at the American Motors Company plant in Richmond, Indiana. Liggett informed the assembled employees that they had bargained at the AMC plant approxi-

mately 2 months prior to the meeting, and that they had bargained in one lengthy negotiation session which covered approximately 18 hours. The union representatives informed the employees that in the contract negotiated at the AMC plant they had broken down their wages into classifications and that the lowest classification was making \$5.75 and their highest was around \$6.50. He testified that Ogren had a copy of the AMC contract in front of her. He stated that the contract was not passed around to the employees and they only knew by what she represented as to the context of the contract. He stated that Mike Jacobs informed the employees that the Union would give them at least a 10-percent increase in their wages and that he guaranteed it. Jacobs also informed the employees that the AMC employees had received a cost-of-living clause, and that we should put a cost-of-living clause in our contract and the amount would be negotiated at the bargaining table. He testified that he had not told any company representative about this meeting, until about a week before the hearing in this matter.

Ed Brockman testified that he had attended the union meeting on April 20, in the company of approximately 20 employees. The union representatives present were Ron Liggett and Mark Jacobs. He stated that he recalled employee Kirt Elliott asking what kind of money they could look forward to getting if the Union were voted in. Mike Jacobs responded by saying that they could not make any promises on wages. Jacobs produced a contract with some unidentified company which was supposed to have about the same amount of employees as the Respondent. Jacobs read from the contract and indicated that the contract provided for about twice the amount of money as the employees of Respondent were making. The name of the company, party to this contract, was not mentioned. Although Jacobs did not read each job classification he did indicate that there was a different classification for millwrights.

Ron Liggett testified on behalf of the Union that at each meeting there was someone questioning how much wage increase they would obtain if the Union were selected. Liggett responded that at each of these meetings the employees were told that the Union could not promise any wage increases, that they could only give them information regarding other units and the wage increases acquired through collective bargaining. He stated that at the June 2 meeting he was asked what wages they could expect if the Union was selected as the collective-bargaining representative. Liggett testified that he told the employees that he could not promise them any wage increase but that he would ask Kathy Ogren and Neil Rinker, both of whom worked at American Motors, to explain their negotiations and their collective-bargaining agreement. Liggett testified that Kathy Ogren spoke first and that she had the American Motors contract, and she read to the employees the cost-of-living provision and base rates. She explained to the employees that she had just experienced an organizational campaign at American Motors in which the Union was certified as the collective-bargaining agent. She explained to the employees in attendance how the election was conducted, and how, not long ago, she was in the same position as these em-

ployees and that she made a choice and cast her ballot. She described to the employees what transpired during the long extended negotiations and explained that at the conclusion of the bargaining session they had reached a tentative contract, which was later voted on by the members, and that was the contract she displayed to the employees at that meeting. Liggett testified that Neil Rinker, a union representative and at one time a maintenance employee at American Motors Corporation, explained to the employees the wage increments that had been received through collective bargaining with the maintenance contractor at the American Motors plant in Richmond, Indiana. He had a copy of the agreement and explained to the employees the wage rates and told the employees that the maintenance employees that were working at American Motors had basically the same skill levels as those employed at Respondent.

By letter dated Friday, June 3, the Union responded to a previous letter put out by the Respondent in which the employees were solicited to seek written guarantees from the Union. In regard to one of the guarantees put forward in the Respondent's letter, the Union responded in the June 3 letter to the employees by stating:

1. Just because the sun came up today, I can't guarantee it will come up tomorrow. Mr. Mosey knows this. What I can guarantee is that your Local will get as much, if not more, support as American Motors of Richmond did (they ended up with a first year pay increase of around 10%) and *that I'll guarantee.*

Respondent's Exhibit 4, a booklet containing the fringe benefits and wages which the employees of American Motors Corporation Richmond Engine Plant enjoyed prior to the advent of the Union, indicates that the lowest paid classification in the plant prior to the execution of the agreement between the Union and American Motors Corporation on April 17 was general labor at \$4.85 an hour and that the highest paid employee received \$6.30 an hour. The collective-bargaining agreement entered into between American Motors Corporation and the Union retains the wage classifications, as set forth in the Respondent's booklet, but does not contain classifications 7, 8, and 9 which are toolmaker, electrician, and maintenance mechanic. Thus, using that as a guide the highest paid employee prior to the advent of the Union was in group 6 a cutter/grinder who was making \$5.60 an hour. The collective-bargaining agreement provided that effective May 2 each employee covered by the agreement shall receive an improvement factor increase of 25 cents per hour added to his base rate. Thus, the immediate pay increase which was obtained by the Union through its collective bargaining with the American Motors Corporation was around 5 percent and not around 10 percent as set forth in the June 3 letter sent out by the Union to the employees at the Respondent's facility in Richmond, Indiana.

It is this misrepresentation, that the employees of American Motors Corporation obtained around a 10-percent wage increase as a result of representation by the Union whereas in fact it obtained only around a 5-per-

cent wage increase, that the Respondent is calling a material misrepresentation. As the Respondent assumed the facts stated by the Union to be true, it therefore made no attempt to respond to the letter. Respondent further argues that even if it knew of the misrepresentation it would not have had time to bring this fact to the attention of the employees prior to the election on June 10. For this reason the Respondent contends that the election should be set aside and a new election directed.

The General Counsel on the other hand argues that the letter did not refer to, or intend to mean that, employees of American Motors Corporation of Richmond, Indiana, received a 10-percent increase in pay as a result of being represented by the Union; that the letter in fact intended to refer to a subcontractor for maintenance at the American Motors Corporation plant known as Millwrights, Inc., and that this fact was made known to the employees during their various organizational meetings. Additionally, the General Counsel argues that the Respondent had an opportunity to respond to the misrepresentation, if there was a misrepresentation, and its failure to do so causes it to live with the effect of the Union's unanswered representations.

This record reflects that a subcontractor, Millwrights, Inc., works at the American Motors Corporation facility in Richmond, Indiana. And apparently its employees are represented by the Union or a sister local. Whether this is common knowledge among the employees of the Respondent I cannot tell from this record. The record does reflect, however, that some of the employees of Respondent are aware of the existence of the subcontractor, Millwrights, Inc., at the American Motors Corporation facility in Richmond, Indiana. However the existence or nonexistence of this subcontractor at the American Motors Corporation plant is not the issue involved in this case. The question is whether or not when the Union was communicating to the Respondent's employees that it made it clear to those employees that it was referring to the subcontractor, Millwrights, Inc., or whether in fact it was referring to the employees of American Motors Corporation. It is my view that the Union at its meetings on April 20 and June 2 made it very clear to the assembled employees of the Respondent that it was in fact referring to a contract negotiated between the Union and American Motors Corporation. What little reference was made to Millwrights, Inc., the subcontractor, was negligible and certainly insufficient to make it known to the employees that the Union was referring to the employees of Millwrights, Inc., rather than the employees of American Motors Corporation. Thus, Kathy Ogren very clearly explained to the employees that she along with the other two union representatives were in a long session with American Motors Corporation, and she produced that contract and read the terms of that contract. In my view there can be no doubt that the Union meant to, and did, refer to the employees of American Motors Corporation, and were not referring to, and did not intend to refer to, the employees of Millwrights, Inc., who worked at American Motors Corporation. Similarly the letter of June 3, which was sent out by the Union clearly referred to American Motors of Richmond and guaranteed that the local union would give as much sup-

port to the employees of the Respondent as was given to the employees of American Motors of Richmond. The letter also very clearly indicates that those employees at American Motors of Richmond ended up with a first year pay increase of around 10 percent. This fact is clearly not so. This is a clear misrepresentation of the actual wage increase received by the employees at American Motors in the first year, which as I have indicated was 25 cents an hour, which in no instance exceeded 6 percent, and in some instances would be as low as 4.4 percent. Therefore, it is my conclusion that the Union clearly misrepresented this fact to the Respondent's employees.

Respondent's president and founder, Charles G. Mosey, credibly testified that the June 3 letter of Respondent came to his attention around June 6, about 3:30 or 4 p.m. He recalls that it was given to him by a Mr. Silvers, the maintenance man who thought that he might be interested in it. He testified that the letter was signed by Michael H. Jacobs; that he has known Jacobs since he was a small child; that he noticed the 10-percent pay increase which was stated by the Union to have been negotiated at the AMC plant, and because of his knowledge of Jacobs he assumed this to be a fact. He also testified that he had no reason to believe that this was not the fact because he had arrived at a somewhat similar figure to pay his employees as a wage increase for that year. He further testified that, after he learned that the Union had won the election, and after he had obtained certain verbal information concerning other union propaganda, he began to wonder about the wage increase. As a result of this he called AMC Corporation and asked if they would send him a copy of their contract so that he could check it out. He testified that American Motors did send him their booklet, and a copy of the contract.⁵ He further testified that he received these around 3 or 4 days after the election. He stated that after making a comparison he learned that AMC had given only what he concluded to be a 5-percent or less wage increase. He then contacted his attorney. Thus, it appears that the Respondent assumed the truth of the representation made in the June 3 union letter, and as it had no contrary information made no effort to respond to this letter. Therefore, as the Respondent was not aware of the misrepresentation it could hardly have made a response to the employees prior to the coming election on June 10. In order to make an effective reply to union misrepresentations concerning wages the Respondent must have recognition of the misrepresentation before the election. And it is insufficient that it has mere access to the document containing the misrepresentation. Here the Respondent was not even aware of the document containing the misrepresentation until June 6, at 3:30 p.m., a short 4 days prior to the upcoming election of June 10.

Additionally, Respondent did not have in its possession the collective-bargaining agreement containing the true facts concerning the AMC wage increase before the election, and it is doubtful that it could have obtained this collective-bargaining agreement in time to make any

⁵ See Resp. Exhs. 3 and 4.

effective reply. If Respondent had called the American Motors on June 6, and assuming that it could have received the information from AMC as quickly as it ultimately did the following week, it still would not have received the contract and the information until just before the 24-hour no-speech period. Therefore Respondent's hands would have been tied and it could not have responded to the employees in any event. Therefore, it appears to me that the Respondent did not make a reply to the misrepresentation because it was unaware of the misrepresentation, and in any event because of the shortness of time it would have been practically impossible for the Respondent to effectively rebut the substantial nature of the wage misrepresentation.

It is clear that the Union had a copy of the contract between American Motors Corporation and the Union at the June 2 meeting and could have exhibited a copy to the employees. It is also clear that there was a substantial misrepresentation of the wage increase in the letter of June 3. It is my conclusion that the Union's misrepresentation of the wage increase it had negotiated for the American Motors employees is plain and undisputed. Similarly, there can be no question that this misrepresentation constituted a substantial departure from the truth.

Both the Board and the courts place a high standard of precision on union statements regarding wages, as wages are one of the main items with which employees are vitally concerned in any union organizational campaign. And it is a fact that employees are aware of campaign issues concerning wages negotiated by the Union at other locations. In this case the Union was the bargaining representative for the AMC employees, and Respondent's employees on the other hand were in no position to know the truth about wages received by the employees at AMC. Thus, it is clear that Respondent's employees would therefore attach an unusual significance to the Union's misrepresentation because it had come from the "horses' mouth," the bargaining representative that had in fact negotiated the wage increase.

Therefore, it is my conclusion that applying *Hollywood Ceramics* standards to the present case it is clear that the Union has engaged in a material misrepresentation of fact with regard to the wage increase negotiated covering the employees of American Motors Corporation in Richmond, Indiana, and thereby destroyed the laboratory conditions necessary for the conduct of a valid election.

Under the circumstances, I find that the Union exceeded the bounds of fair lawful electioneering and interfered

with the free choice of the employees. Accordingly, I shall recommend that the election be set aside and that a second election be conducted.

Objection 2c alleges that the Union told employees that present benefits would not be reduced in any collective-bargaining agreement reached with the Employer. This statement was allegedly made by Union Representative Jacobs at a union organizational meeting in May. Jacobs was supposed to have stated that a Federal law provided that Respondent could not take away any current or present benefits and that they were guaranteed. This statement was apparently contained in an affidavit by employee Silvers whose affidavit was presented to the Regional Director at the outset of these proceedings. Silvers was deceased at the time of the hearing and there is no other evidence in this record to support this statement. In any event it appears that the Employer was aware of this statement and had an ample opportunity to respond to it prior to the election. Therefore, this statement affords no basis for setting the election aside.

At the hearing the Respondent offered evidence to establish that the Union misrepresented facts overstating the Respondent's worth. In support of this misrepresentation Respondent offered testimony of Charles G. Mosey that the Union represented the worth of Respondent at or about \$30 million. Mosey testified that the actual worth of the Company was about \$300 to \$400 thousand. This representation by the Union is such an exaggeration that no one could be expected to believe it. And as such it cannot be a basis for setting aside the election.

Upon the entire record in this matter and pursuant to Section 10(c) of the Act, I shall enter the following recommended:

ORDER

Having found that Respondent engaged in a material misrepresentation with regard to the wage increase it obtained for the employees of American Motors Corporation in Richmond, Indiana, and communicated that misrepresentation to the employees of the Respondent to which the Respondent was unable to reply or to correct prior to the election in this case, it is my conclusion that the Respondent has engaged in a material misrepresentation of fact which destroyed the laboratory conditions of the election as required by the Board and that the election shall be set aside and a second election conducted.